PUBLIC PROSECUTOR

v

SAIFUL AFIKIN MOHD FIRUS

HIGH COURT MALAYA, KOTA BHARU
DATO' NIK HASHIM NIK AB RAHMAN JC
[CRIMINAL APPEAL (JUVENILE) NO: 41-32-95]
29 FEBRUARY 1996

CRIMINAL PROCEDURE: *Juvenile – Orders on juvenile offenders – Juvenile offender pleading guilty to culpable homicide not amounting to murder – Whether Juvenile Court empowered to make orders under ss. 12(1)(d), 13(3) & 21(1) of Juvenile Courts Act 1947 – Probation order – Whether inapplicable to homicide cases – Order of compensation – Whether invalid when no opportunity to be heard was given - Proper and suitable order – Penal Code s. 304 – Juvenile Courts Act 1947, ss. 12(1)(d) & (f), 13(3)& (4), 15, 21(1), 40.*

Before the Juvenile Court, the respondent, a juvenile offender aged 16, had pleaded guilty to culpable homicide not amounting to murder under s. 304 (first limb) Penal Code. In consequence, the Court imposed the Orders that (i) the offender be placed under the care of his parents for a period of two years under s. 12(1)(d) Juvenile Courts Act 1947; (ii) the offender be placed under a probation order for two years under s. 21(1) of the Act; and (iii) the guardian of the offender pay RM1,500 to the deceased's parents as compensation pursuant to s. 13(3) of the Act. The Public Prosecutor, dissatisfied, appealed against the orders arguing before the learned Judge that the orders imposed were unsuitable and not commensurate with the offence, and that the Juvenile Court had failed to take into account public interest in making the orders.

Held:

[1] The orders (ii) and (iii) were made not in accordance with the provisions of the Juvenile Courts Act 1947 and were therefore defective. The Probation Order under s. 21(1), clearly, cannot be made in homicide cases.

[2] With regard to the order of compensation under (iii), the law stipulates that an opportunity to be heard must be given to the parent or guardian before an order of compensation is made against them under s. 13(3) of the Act. In this case, no such opportunity was given to the offender's mother although she was present during the proceeding. The Juvenile Court, therefore, fell into serious error when it made the order in question. The irregularity renders a failure of justice which cannot be cured and makes the order invalid.

[3] The order under s. 12(1)(d) is not suitable or commensurable with the facts and the offence charged. The end of justice would be suitably be served if the offender is sent to an advanced approved school rather than to prison. The offender is committed to Henry Gurney School until he attains the age of 21 under ss. 21(1)(f) and 40 of the Juvenile Courts Act 1947.

[Appeal allowed. Order accordingly]

Cases referred to:
Ang Chin Sang v. Public Prosecutor [1970] 2 MLJ 6 ***(refd)***
Tukiran bin Anson v. Public Prosecutor [1955] 21 MLJ 24 ***(foll)***
Muharam bin Anson v. Public Prosecutor [1981] 1 MLJ 222 FC ***(refd)***

Legislation referred to:
Juvenile Courts Act 1947, ss. 12(1)(d), (f), 13(3), (4), 15, 21(1), 40
Penal Code, ss. 302, 304
Punishment for Vandalism Act 1966, s. 3

For the appellant - Zameri Mat Nawang, DPP
For the respondent - Mohd. Apandi Ali; M/s. Apandi Ali & Co.

JUDGMENT

This is an appeal by the Public Prosecutor against the orders made by the Juvenile Court.

The respondent, a juvenile, was originally charged with murder of one Ahmad Farid bin Mat Saleh @ Mohamad on the 28 November 1992 under s. 302 of the Penal Code. However, the charge was subsequently amended by the prosecution to that of culpable homicide not amounting to murder under s. 304 first limb of the same Code. The respondent pleaded guilty to the latter charge and the Court made the following orders against him that:

(i) the offender be placed under the care of his parents for a period of two years under s. 12(l)(d) Juvenile Courts Act 1947 ('Act');

(ii) the offender be placed under a probation order for two years, under s. 21(l) of the Act, and

(iii) the guardian of the offender to pay RM1,500 to the deceased's parents as compensation.

At the time of the offence the offender was 16 years and 1 month old. He was borned on 21 October 1976.

Briefly, the facts were that on 28 November 1992 at about 4.00 pm the offender met the deceased at Hankyu Supermarket, Kota Bharu. They set eyes on each other, and the offender became scared. The offender claimed that he was chased by the deceased and his friends. Fearing that the deceased

might be going after his twin brother who looked alike and was then in the town, the offender returned to the town armed himself with a knife. On arrival at the bus stand near Kelantan Hotel, the offender was confronted by the deceased. They exchanged blows. In the course of the fight, the offender stabbed the deceased on the right neck with the knife. The deceased who was then 19, died due to acute haemorrhagic shock. The offender threw away the knife in a well but it was recovered subsequently. The offender surrendered himself.

On going through the records, I find that the foregoing orders (ii) and (iii) are defective, in that they were made not in accordance with the provisions of the Act. It appears to me that the Probation Order cannot be made in homicide cases. Section 21(l) of the Act states:

> Where a Juvenile Court by or before which a juvenile is found guilty of **an offence other than homicide** is of the opinion that having regard to the circumstances, including the nature of the offence and the character of the offender, it is expedient to do so, the Court may, instead of sentencing him, make a probation order. (Emphasis added).

The offence under appeal is a clear-cut homicide case under s. 304 of the Penal Code. That being so, the Order imposed under (ii) aforesaid, placing the offender under probation was wrongly made and must be set aside.

With regard to the order of compensation under (iii) the law stipulates that an opportunity to be heard must be given to the parent or guardian before an order of compensation is made against him. Section 13 of the same Act provides:

> (3) Where a Court thinks that a charge against a juvenile is proved, the Court may make an order on the parent or guardian under this section **for the payment of compensation** or costs or requiring him to give security for the good behaviour of the juvenile, without proceeding to record a finding of guilt against the juvenile.
>
> (4) An order under this section may be made against a parent or guardian who, having been required to attend, has failed to do so, but, save as aforesaid, no such order shall be made without giving the parent or guardian **an opportunity to be heard.** (Emphasis added).

The provisions are precise and unambiguous. They are there to be followed and complied with. However, the records do not show that such an opportunity was given. The offender's mother was present during the proceeding. She was not examined, neither was she asked whether she was agreeable to pay the compensation. So, in the absence of any inquiry as regard her affordability to pay, the Juvenile Court fell into a serious error when it made the order of compensation against her. In my view, such an irregularity renders a failure of justice which cannot be cured and makes the order invalid. Therefore, the order (iii) must also be set aside.

Encik Zameri bin Mat Nawang for the Public Prosecutor, in urging the Court to substitute the order placing the offender under the care of his guardian under s. 12(l)(d) with a more appropriate order in order to reflect the seriousness of the offence, submitted that the Juvenile Court had failed to take into account public interest in making the order. He cited the Singapore case of *Ang Chin Sang v. Public Prosecutor* [1970] 2 MLJ 6 in support. In that case, a boy under 16 years of age was convicted by a Magistrate's Court for an offence punishable under s. 3 of the Punishment for Vandalism Act 1966, and was sentenced to three months imprisonment and three strokes of the cane. The sentence was affirmed on appeal.

Learned Counsel for the respondent, Encik Mohd. Apandi Ali, however, contended that the case was not relevant for consideration as there was no equivalent Act in Malaysia. The Vandalism Act is "an Act to provide for exemplary punishment for acts of vandalism".

With respect, *Ang's* case was cited by the learned Deputy as an example to show that in suitable cases, even a boy under the age of 16 could be ordered to be imprisoned. However, that case was decided based on the law in Singapore. Unlike the Vandalism Act 1966, the Juvenile Courts Act 1947 is an Act to provide for the care and protection of children and young persons. On proof of an offence, the Juvenile Court shall, in addition to any other powers exercisable by virtue of this Act or any other law for the time being in force, have power under s. 12(l):

(a) to admonish and discharge the offender;

(b) to discharge the offender upon his entering into a bond to be of good behaviour and to comply with such order as may be imposed;

(c) to convict the offender to the care of a relative or other fit person;

(d) to order his parent or guardian to execute a bond to exercise proper care and guardianship;

(e) without making any other order, or in addition to an order under para (c) or (d), to make a probation order under s. 21;

(f) to order the offender to be sent to an approved school or Henry Gurney School;

(g) to order the offender to pay a fine, compensation or costs; and

(h) where the offender is a young person and the offence is punishable with imprisonment the Court may, subject to s. 15(2), impose upon him any term of imprisonment which could be awarded by a Sessions Court or, if the Court considers that its powers are inadequate, commit him to the High Court for sentence.

There are, however, restrictions on punishment of children and young persons under the Act. Section 15 provides:

> (1) No child shall be sentenced or ordered to be imprisoned for any offence or be committed to prison in default of payment of a fine, damages or costs.
>
> (2) No young person shall be sentenced or ordered to be imprisoned **if he can be suitably dealt with in any other way** whether by probation, fine, or committed to a place of detention, approved school, or Henry Gurney School, or otherwise.
>
> (3) A young person sentenced or ordered to be imprisoned shall not be allowed to associate with adult prisoners. (Emphasis added).

The issue before the Court now is whether the Order placing the offender under the care of his parents under s. 12(i)(d) is suitable in the circumstances of this case.

The offender was charged with an offence of culpable homicide not amounting to murder under s. 304 first limb of the Penal Code, which carries a punishment of imprisonment for a term which may extend to 20 years and shall also liable to fine. At the material time the offender was a young person, being above 14 and under 18 years of age, and at the hearing of this appeal he was 19 years and eight months old. For the purpose of this appeal, the relevant age to be considered by the Court is the age when the offender committed the offence and not the age at the time of the appeal. There can be not the smallest room for doubt that this offence is very serious indeed and the offender should be seriously dealt with. A valuable life was sacrified at the hand of the offender. If not for his age, I would not hesitate to send him to imprisonment. In the circumstances of this case, I do not consider a sentence of imprisonment is approriate and called for. Bellamy J in *Tukiran bin Taib v. Public Prosecutor* [1955] 21 MLJ 24 at page 25 said:

> It has been stressed by this Court that it is very desirable that young offenders, that is, offenders between the ages of 17 and 21 years, who are also first offenders, should be kept out of prison, if possible ... I consider that it would be more beneficial to the accused, and in the long run to the community at large, to send him to an advanced approved school rather than to prison ...

Though the *Tukiran's* case was decided 41 years ago, I consider it is still good law, and I would adopt the same approach in deciding the case under appeal. To my mind, the order under s. 12(l)(d) is not suitable and commensurable with the facts and the offence charged. The offender had been detained for two years nine days when he was charged for murder. I take that into consideration in assessing a suitable order against him. (see *Muharam bin Anson v. Public Prosecutor* [1981] 1 MLJ 222 FC). The offender is also a first offender. The end of justice, in my view, would suitably be served if the offender is sent to an advanced approved school rather than to prison.

I therefore quash the order made by the Juvenile Court, and order that the offender be committed to Henry Gurney School until he attains the age of 21 under ss. 21(1)(f) and 40 of the Act.

Reported by W.A. Sharif